Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BARBARA SMITH,	)	
	)	
Plaintiff,	)	Case No. 3:20-cv-00851-MO
	)	
v.	)	
	)	
ETHICON, INC., et al.,	)	March 29, 2022
	)	
Defendants.	)	Portland, Oregon
	)	

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT SENIOR JUDGE

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(P R O C E E D I N G S)

(March 29, 2022; 11:00 a.m.)

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THE COURTROOM DEPUTY: We are here today for oral argument in Case No. 3:20-cv-851-MO, Smith, et al. versus Ethicon, Inc., et al.

Counsel, please state your name for the record.

MR. LOWTHER: John Lowther, Doyle Lowther, on behalf of plaintiff.

MR. DUYCK: Dan Duyck, Duyck & Associates -- excuse me. Dan Duyck, Duyck & Associates, on behalf of plaintiff.

MR. CONOUR: Good morning. Ken Conour on behalf of defendants.

MS. LENOWSKY: Diane Lenowsky, also on behalf of defendants.

MR. YOSHIKAWA: Jin Yoshikawa, also on behalf of defendants.

THE COURT: Thank you all for being here today. Let me start with my tentative thoughts on the two motions in front of me.

The first involves plaintiff's motion to strike J & J's experts, or at least some of them. As you all know -- forgive me for stating the obvious, but as you all know, there's more than one lens through which we look at expert testimony. There's the lens of the expert witness testifying

as such, frequently -- usually otherwise disconnected from the case but offering independent expert testimony. And that lens is provided both by the FRE and the FRCP. And there are hurdles to go through to get such a witness ready for trial.

And then there's the lens of witnesses who simply offer expert opinions but may not be looked at through the lens of the FRCP, just witnesses who offer what's labeled as expert opinion testimony under FRE 702. And they may not have to go through those same hurdles. The classic example of that is the treating physician who, contrary to what some people say, clearly is offering expert testimony under 702, but hasn't been required to, for example, go through the notice and report requirements of the FRCP.

And here I think we're in that realm. And so it's clear to me that there's a hard rule in this case that the defendants get five expert witnesses. And I read that to mean five what I'll call independent experts. I'm not sure that the retained versus non-retained matters so much as just are they independent experts not offering perception and personal involvement testimony in the case.

So the defense has those five experts. They have one alternate which is off the table, as I understand it from the defense anyway. So those five independent experts who, as I understand it, have in fact gone through the procedural hurdles of the FRCP are qualified for our purposes today, at least, for

trial.

Then the remaining numerous witnesses who have 702 testimony to offer are, if I understand it correctly, all people who have -- we'll call it company involvement in the device. Is that right?

MR. CONOUR: That's correct, Your Honor.

THE COURT: How many are there?

MR. CONOUR: There are 12. Ten were actual current or former employees, and two were doctors that were advisors in the development of the product.

THE COURT: So we've seen this in many of these cases, and so the struggle there is I think it would be, in my view, nonsensical to read the MDL order as prohibiting such testimony or only allowing a grand total of five, since this is a case which involves engineers and scientists and advising doctors. And so to say, well, you only get five people who have specialized knowledge beyond the ken of the jury would essentially end the case.

So what we have to do is come up with a way in which those people are allowed to testify and offer 702 testimony as it relates to their personal involvement but not sneak in through the back door independent expert testimony by a bunch of people who sort of pile on and add to and say they agree with the independent experts in the case.

One typical way to do that, of course -- well, one

good tether is to say that these people can only testify to what they were involved in and not, you know, independently testify about things they weren't personally involved in.

The second pretty good tether in a lot of cases is to say, well, were they deposed? And if they were deposed -- Well, let me back up. Of course the FRCP, all of the protections in the FRCP about experts are generated, in my view -- not to put too fine a point on it -- are generated because for lawyers, experts are slippery creatures, and if you give them much room, they will wiggle away from you in ways that are unfair for trial. And so we try to put them in a box, and the box we put them in for FRCP is a report, and in my courtroom, experts, they're pretty much stuck with what they said in their report. If they didn't say it in their report, too bad.

So for these folks, there is no report, but let's start with -- let me just start by asking. Is there a deposition of all 12 of them?

MR. CONOUR: All 12 of them have been deposed. There's 58 days of depositions for the 12 witnesses. Plaintiffs have designated deposition testimony from nine of the 12 already, but all 12 of them have been deposed in the MDL.

THE COURT: So another -- so there are two good sort of semi boxes to put people like these, which I put in the

analytical category of treating physicians, who often, for example, have chart notes and a deposition, so there are no surprises. And the way to have no surprises here is, one, a sort of an almost ideological limit, and that is that you've got to stick with what you were involved with.

I'm going to teach you a great word just because it comes up right now. It's one of my favorite big words. Ultracrepidarian. Ultracrepidarian comes from -- it's a Greek word -- it's a Latin word from an earlier Greek word in which a sculptor was sculpting a human statue and wanted the advice of a cobbler on how to get the sandals just right. And so he did. He brought in a cobbler, and the cobbler advised him how to get the sandals just right. And then the cobbler being there and sort of in the glow of having been asked his opinion, started to offer more than that. You know, "Well, while I'm here, I don't think the knees look right," or whatever, and the sculptor said essentially to him, "Nothing above the shoes." And that's what ultracrepidarian means: "nothing above the shoes."

So these folks, they're stuck with what they did, nothing else.

And then the other way to prevent surprise is, well, they've got to stick with what they said in their depositions. Again, that's the sort of functional trade-off for not having an expert report but letting him offer expert opinion

testimony.

That's my tentative view on how to handle these 12 folks, 12 plus five. The five, there's no dispute, they're in. Again, I'm not making a trial ruling that their whole testimony is in, just I don't view plaintiff's motion that I'm dealing with right now as seeking to strike those five.

The alternate is out. So we're really talking about these 12 people, and my intention -- tentative -- is to let them testify to what they were involved with even if that testimony sounds like 702 testimony, limited by their own personal involvement and by the fact that they've been deposed.

Since that's my tentative ruling on your motion, I'll hear from plaintiff first.

MR. LOWTHER: That's exactly what we want, Your Honor. I did not want our motion viewed, as I was listening to your discourse to us, to mean that we wanted these witnesses struck from the record, period. Mr. Conour is right. The defense is correct, we did designate testimony from a number of these witnesses. We want their testimony. We want their testimony at trial. So we submit to Your Honor's tentative, and I have nothing further.

THE COURT: Are you okay with that tentative ruling?

MR. CONOUR: One clarification?

THE COURT: Yes.

MR. CONOUR: They've also testified at trial, so I

would request that their testimony be limited both to their deposition testimony and their prior trial testimony. That's also been made available to plaintiff's counsel.

THE COURT: The whole point is no surprise. Are you familiar with their prior trial testimony?

MR. LOWTHER: I'm familiar with some of it. We would like it limited to -- I'm familiar with some of it. I'm not familiar with all of it. This is a new twist. Your Honor is right. We were trying to prevent them from coming in under 702 or some of these other expert provisions, just coming in and saying whatever they wanted. We had 70 pages, essentially, of designations, and I had no idea what these people were going to come say and do.

THE COURT: Why don't you take a look at that, because I am going to allow their deposition testimony. You look at their prior trial testimony. You don't have to go through line by line, but if you feel like they previously testified, for example, as a retained expert in some trial, if that happened, well, then that's going to be a problem for me. So you take a look at it and let me know if there's a specific piece of prior trial testimony you view as problematic as a source of what they can testify -- identified source of what they can testify to in our trial.

MR. LOWTHER: Yeah. And the reason the question is so difficult is there have been so many trials all over the

country, all with differing standards. My other fear is that hey, well, this court ruled on this particular witness in this trial to let this in, so, Your Honor, you should let it in, too. I'm contemplating what are going to be the knock on effects. So I'd like to take a look, and maybe the appropriate way to handle this in the future will be via a motion to exclude or some sort of in limine process where we can put it before you --

THE COURT: It's up to you to try to eliminate trial testimony you view as unfair in some way, whether it's under 403 or some other way.

MR. LOWTHER: Okay.

THE COURT: So for now I am granting in part and denying in part your motion. We'll allow the five designated experts. I won't allow the alternate. We'll allow these 12 people to testify at trial, limited to their personal involvement, and limited by their prior deposition, and for now we'll say probably trial testimony subject to further motion practice in advance of trial.

The second motion is the motion to exclude the case-specific testimony of Dr. Elliott. I agree with plaintiffs that this motion is a second bite of an apple forbidden by earlier scheduling. Had it been merely limited to updated opinions after Ms. Smith's new medical exam, maybe, but it isn't limited to that. So my only concern -- so I think the

motion should be denied as violating the briefing schedule in this case.

My other concern again is a similar one, only now running the other direction, and that is by just denying the motion -- well, I'm not concerned about denying the motion substantively on a straight-up *Daubert* challenge. So, for example, while I'm denying it, tentatively denying it procedurally, if I were to take up, for example, the differential diagnosis issue, I'd disagree with the defendants and say it was sufficient.

There's one issue, though, that raises a similar kind of cabining question, and that is that one challenge is that Dr. Elliott doesn't specifically link an identified defect in the product with a harm to plaintiff in his report. So because I'm denying the motion procedurally, that's not an issue for admissibility under *Daubert*. That's just waived. But typically, as I said a moment ago, we would limit experts to what they say in their reports. That's the point of having them produce reports.

I got the impression from the briefing that you wanted to try, because again the idea being there's no surprise to this, from his prior testimony or depositions, you wanted to try to close that gap at trial by having him identify something he did not identify in his report, and that is the specific causal link. Is that correct?

MR. LOWTHER: Your Honor, we do believe the specific causal link is in his specific report. However, he's designated as both a general and a specific expert, and he has de bene esse trial testimony that is incorporated into his general report, and we think it's fair play to be able to rely on those statements as well.

THE COURT: Well, my concern is solved if you feel -- I don't mean solved like I'm ruling on it today, but my concern that we need to identify a limiting principle here is solved if you think that what you need to get out of him is already in his report. If that's your view, then we don't need to take it further. It's really a concern I'm raising not so much for how to rule on this motion, since the ruling would be procedural, but how to handle what I viewed as an upcoming issue.

MR. LOWTHER: In other words, if Dr. Elliott testified at other trials around the country, no, we are not going to seek to introduce that trial testimony. But he is designated as -- I apologize if I'm misunderstanding --

THE COURT: Let me explain my question a little bit better. I feel like I didn't do a very good job of that.

So if, as I think I'm going to do, I deny this motion as violating the briefing schedule, then we don't have a ruling on the merits, and this particular *Daubert* challenge to your witness Dr. Elliott doesn't get run through a second *Daubert* filter. That's fine. That's what procedural rulings do.

But there is an issue raised that doesn't affect the merits of a procedural ruling but would come up at trial. What I would expect at trial is -- so a defense theory about your Dr. Elliott is that he doesn't close the causal link, and therefore doesn't do what an expert is required to do to satisfy *Daubert*. Well, if we ignore that problem for *Daubert* challenge purposes because the motion is procedurally too late, it is still something that would come up at trial. They still would be allowed to object at trial or do something, object at trial if you tried to close that loop. If there was this gap in his report that gets ignored for today's purposes but comes up at trial when you try to close the gap at trial and get him to say here's the causal link, because then the objection isn't procedurally defaulted, it's not so much a *Daubert* objection anymore. Now it's a trial objection that the witness is testifying to something not in his expert report.

And if that motion were made at trial, your response would be what?

MR. LOWTHER: My response would be he was deposed in this case. That deposition testimony should be permitted. It was the defendants' deposition. They wanted it.

THE COURT: Deposed before or after his report was written? I assume after?

MR. LOWTHER: Deposed after his report, but then we requested, because Mrs. Smith had additional procedures, we

requested of Judge Acosta that we be allowed to go through a second IME process. So, in fact, Dr. Elliott did two examinations, and the defendants were afforded the same opportunities. So there were two rounds of independent medical examinations, at which point both sides submitted amended reports following that deposition.

THE COURT: All right. So you're really telling me two answers. One answer I thought you were giving me is that the causal link is in his expert report, you think you can find it there. Right?

MR. LOWTHER: Yes. And also I believe the causal link is in his deposition testimony.

THE COURT: We'll get to that.

MR. LOWTHER: Okay.

THE COURT: But those are two very different things because, as I said, the point of the report is if you have an expert report, you don't have to search the country for deposition testimony or prior testimony at trial or other articles he may have written. The report allows you as the opponent of this expert to say, here's the universe I must master to cross-examine this witness.

So your answer number one works well for trial; that is, well, no, it is in the report. We can litigate that later. I'm not accepting that as true, I'm just saying that's one answer that works.

The other answer needs to be dealt with today, and that is if it isn't in there sufficiently, it's in his deposition in this case. Right?

MR. LOWTHER: So let me see if I can assuage the Court that we are not going to search the United States for Dr. Elliott's transcripts, testimony in other cases. What we are going to cite is essentially what is already on the docket in our opposition. It's going to be his case-specific report, the amended version; it's going to be his deposition in this case; and it is also going to be his general report and his de bene esse testimony which is incorporated into that general report. That's cited in our brief, in our opposition. This was put forward in the MDL.

So if you're looking for the playing ground the plaintiffs are seeking, that is our operative universe, Your Honor, along with the documents, the other testimony that Dr. Elliott references at length in his case-specific report, his other documents and testimony that he refers to in forming his opinions. But yes, that will be our universe.

THE COURT: Thank you.

Let's start with the procedural ruling. I said it was tentative. I want to give you a chance to tell me I shouldn't make that procedural ruling.

MR. CONOUR: I'd like to do that.

Your Honor, what we have here is an expert who has

given three reports. The last one was in June 30th, 2021. That was after we filed our original *Daubert* motion. And in his third report, the June 2021 report, he includes in that materials that he didn't have in his prior reports. Specifically, his second medical examination of the plaintiff is incorporated into that report. That's a case-specific report. It's supposed to provide the basis for his specific causation opinions. And he bases that not only on the prior records but also on this IME that took place after his prior report. So we're handcuffed. How can we attack his case-specific opinions if we don't have those case-specific opinions until June 2021?

THE COURT: I should be clear. If I viewed today's *Daubert* motion as limited to the most recent reports, new statements, new opinions, post last IME, then I think it would not be procedurally improper. My problem is I don't view it that way. I view it as a second general attack on this witness, making arguments that could have been made prior to the last IME.

But you're correct. You had under the rules a scheduling order in this case, providing the opportunity to file a new *Daubert* motion against just what's new. In my view, the problem you're having, in my view, is you didn't do that. You filed a second more general *Daubert* motion against stuff that predates it, or at least your theory is one that could

have been filed earlier.

MR. CONOUR: Here's the problem I have with that, Your Honor, is after --

THE COURT: Is your microphone on?

MR. CONOUR: I'm sorry, let me get closer.

THE COURT: Okay.

MR. CONOUR: After we filed our original *Daubert* motion, the plaintiff underwent subsequent surgeries and had subsequent diagnoses, including a fistula that developed from the erosion that was found. So her medical condition evolved after that, and plaintiff argued that because her medical condition has evolved, we should be allowed a second examination and we should be allowed then to provide another report identifying what's caused these complications.

THE COURT: I understand that.

MR. CONOUR: With that --

THE COURT: Is it your view that your motion today that we're dealing with against Dr. Elliott is limited in scope to opinions he's rendered that are only based on what is found from her last round of medical examination?

MR. CONOUR: Well, that's the problem, though. His opinions were stated earlier to some extent, but they evolved based upon her subsequent surgeries, her subsequent development of a fistula, and his subsequent examination. At any point in time he could have said, these conditions were caused by this

defect. The fact that he did it before, but he continues to do it now should not preclude us from being able to make that argument based entirely on his new report.

If you look at our motion, it is aimed entirely at his new report. We could not have made the arguments based on what his current opinions are back in 2019, before he had the second IME and the third report. We might have been able to make similar arguments, but he could always revise those opinions and change them, evolve them based upon what's happened to her and what he's done with her and any other research or what have you he may have done related to her specific conditions.

THE COURT: Let's take the argument that his opinion doesn't close the causal loop. Is that an argument you could have made in your first round of *Daubert* motions against this opinion?

MR. CONOUR: Oh, absolutely. We could have made that opinion. But he also could have changed his opinion based upon the Court's order allowing him to do a further IME and a further report. So we're basically stuck with a further report that details what his current opinions are regarding specific causation without any means to challenge that. And that's where we say that's not appropriate.

THE COURT: Well, so your argument works well if you're facing something Dr. Elliott is saying that you've never

seen before and never could have attacked before. Then your argument has a lot of strength. "We're stuck, Your Honor, he shifts, he changed, and we need to attack him now for what he's now saying." I agree with that position as far as that goes.

Where I struggle is when you make an argument that you could have made before, then at least your argument that we're in an impossible position doesn't work. You're not in an impossible position. You could have attacked it before, you just didn't. And so it's essentially giving you a chance to do now what you didn't do earlier but could have done earlier.

Why should I allow that?

MR. CONOUR: What we're stuck with then is basically preventing defendants from making an argument that they would otherwise be entitled to make solely by virtue of a stipulation that can be read one way or another, when in fact plaintiffs were allowed to amend their report. They could have added other opinions. They could have made -- tied up that causal link, which they haven't done, and it just seems that we're putting the form over substance.

THE COURT: Is there a tactical or strategic reason why you wouldn't have attacked this causal gap when you first had the opportunity to do so in your first round of motions but would have sensibly chosen to wait until later to attack it?

MR. CONOUR: Part of the problem was that in the MDL, Dr. Goodwin was not ruling on case-specific motions, and he

wasn't looking at specific case law applicable to those motions, and so we were stuck without really having a basis to argue state-specific law, and that's primarily what we think we get into when we talk about the causal link and what's needed under Oregon law to make that causal link. So that's part of the argument there is that it was a strategic choice, that's true, but it's based upon the circumstances of the MDL and the fact that we weren't getting rulings based on state-specific laws having to do with causation.

THE COURT: Assume just for a moment -- I'm not announcing a loss at this point. Assume just for the moment that we had to move on and that you lost this motion because it doesn't follow the briefing schedule. Then we'd be picking up this point that while you contend there's a causal language, at trial they're going to want to try to close that link. One way they want to close it is completely acceptable if my ruling is correct on the procedural grounds, and that is they can just -- they just contend the report itself doesn't have that gap in it.

But the other way they want to close it is they want to say it's in his deposition. Let's just start with that. It's in his deposition, and so let's close the gap in his report with his deposition testimony at trial.

It's a little bit funny, I guess, because I'm previewing something that's going to come up at trial, but why

not try to deal with it now.

So what would your position be in that moment?

MR. CONOUR: Sure. You began the hearing by talking about the two different lenses that you look at experts, and the experts that are not independent -- excuse me, the experts that are independent that are retained. There's a rule and a procedure for dealing with those experts, and that rule and the procedure is that they are to provide their opinions in a written report. It's the four corners of that report that gives you the parameters of what they're to testify at trial. They don't cure that report through deposition. We may explore the parameters of their opinions at deposition, we may check the basis for their opinions at deposition, but they're not allowed to expand their opinions based upon the deposition. The rule is clear that it's their report, and the case law interpreting that rule is clear that's the report that's to provide the four corners of what they're to testify at trial.

There is a recent case -- I wasn't prepared to address this because I didn't expect this to come up in this manner at the hearing, but there was a recent case where plaintiffs tried to do just this with their experts in another Ethicon case -- and I can provide that citation this afternoon -- where plaintiffs argued that the report may be lacking in some respects, but the expert cured that through his deposition. And the Court ruled precisely that no, you can't

cure the report. You can't expand the report to provide additional different opinions in a deposition. That's not the purpose of the deposition. That's the purpose of the report.

THE COURT: Were you the deposition lawyer?

MR. CONOUR: No, I was not, Your Honor.

THE COURT: Do you know whether causation was inquired into, his opinion on the causal link was inquired into at the deposition?

MR. CONOUR: Yes. The opinions that he has stated --

THE COURT: My question was imprecise. Do you know if the defense inquired into his opinions on the causal link at the deposition or was it just brought up by plaintiff?

MR. CONOUR: No, it was inquired into in terms of -- specifically with regard to the differential diagnosis. He was asked why he didn't include specific conditions that plaintiff had, which were vaginal atrophy, smoking, and the prior hysterectomy. They asked why he didn't include that in the differential diagnosis, and he talked generally about, well, I don't believe in the reports of smoking, linking it to mesh. Although there are certainly medical literature out there that does do that, I just disagree.

We asked why the hysterectomy wasn't linked, and in a roundabout way his answer was consistent with his report, because he's not actually saying that the mesh caused the pelvic pain. He's saying that the mesh surgery has not changed

the pelvic pain. And that's in his new report, too.

And then third, regarding the vaginal atrophy, his answer was essentially that atrophy has existed in women as -- since the beginning of time. It doesn't really cause any problems unless, of course, the woman is sexually active. And he didn't address the fact that the atrophy actually has been identified by many experts and also medical literature as causing or contributing to the development of mesh exposure, which they contend here is the injury.

THE COURT: Thank you. I will invite you to submit the case you're referencing later today.

Do you wish to be heard further?

MR. LOWTHER: Yes, Your Honor. And I have a good working relationship with the defense, but I will say I am particularly sensitive to this notion of a second bite at the apple, and if I could just revisit the history of why I think your tentative should be adopted.

There have been multiple attempts at second bites of the apple in this case. After filing summary judgment, they tried to file another one, even when I frankly thought they told us they weren't going to do that. And Judge Acosta got on the phone and shot that down.

There were attempts after the close of discovery to start deposing even more doctors after discovery had closed. So that is why I made it a point, an affirmative point with

Judge Acosta in getting this second round of IMEs, I wanted any challenge to be limited as Your Honor so indicated. And we got that limitation. We thought that was going to be honored, and then here comes this motion which is not limited to just new opinions, it is a wholesale attack which absolutely could have been brought in the MDL.

A few more points on this, Your Honor. Number one, I reject the notion that we couldn't have gotten a ruling because it's state specific. We always knew this case was coming back to Oregon. We always knew Oregon law was going to apply. We made no arguments to the contrary.

And further, when you ask about the tactic, if you'll forgive me if this sounds like I'm casting an aspersion -- I'm not -- but what I think the attack here is, these cases have been remanded all over the country, and you're getting various opinions from jurisdictions, in some cases with wildly differing law concerning the admissibility under 702, and that causal link that you need to establish. And what I think the tactic is -- because we're seeing it -- is get an opinion that favors the defense in this one jurisdiction and then bring it into another jurisdiction where the standard for admissibility may be far more lenient.

Your Honor, I think that's exactly what happened here, because they cite to you as their chief case the *Sluis* case out of Texas, never addressing the Ninth Circuit standard,

which I think we properly identify in *Messick* and in *Phelps*. We also cite Your Honor's opinion in *Pearson*, a markedly different standard for admissibility, and that is the tactic, in my opinion. That is why this motion wasn't brought originally. They were losing at the MDL. They were losing every time they tried to challenge these causation opinions, so hold it in abeyance until these things have been remanded, then we'll get a couple of opinions that we can file late in the game and take our last best shot to derail trial.

And, again, I hope it doesn't sound like I'm casting aspersion -- I'm not -- but that is what I think the tactic is. And, again, we told Judge Acosta we wanted a firm limit on the second bites of the apple. This is not the first time it's happened.

THE COURT: All right. Thank you. I think I've got your point there.

Secondly, if I did make this timeliness or procedural ruling, then we're left with the second question, and I guess I want to think about whether this question is squarely in front of me right now today. I think the answer is no, and I might just need to wait. I think probably the better course of valor is not to rule today but just to say that I see an upcoming issue even if I make this procedural ruling, which is -- probably needs to be resolved in the -- either in trial itself or in motions in limine, and that is that to prevent this

Daubert challenge under *Daubert*, as an opinion that's insufficiently conclusive on the point that makes it relevant at trial, to prevent that attack on Dr. Elliott does not prevent a subsequent attack that says this witness right now is offering opinion not to be found anywhere in his report.

And so I just want that to be clear so that when that day comes, you won't be lulled into thinking that I've somehow ruled that no further attack can be made against Dr. Elliott. I see the possibility of this further attack and, in fact, it's quite a serious one if, as I said earlier, I adhere to the general idea that experts are stuck with what's in their report.

I'm not going to rule on that today. I just want the parties to know that's where we're headed, and you'll be ready to litigate that at a more appropriate time.

Any questions about that?

MR. CONOUR: No, Your Honor.

THE COURT: All right. Thank you.

I am going to make final my tentative rulings in both scores, then. Plaintiff's motion to strike defendants' expert, that will be my ruling, the one I expressed earlier, and I do find that this is the proverbial second bite of the apple. It's an attack on Dr. Elliott on grounds that aren't prompted, in my view, by events subsequent to the first round of *Daubert* motions, but raise arguments that readily could have been made

earlier, and therefore shouldn't be made now in a second occasion.

It's good news-bad news because that same motion, which I'm denying, raises an issue that will be prominent later at trial, and that is, is Dr. Elliott stuck with his report. We'll see where that goes.

Anything further today from plaintiff?

MR. LOWTHER: A couple of housekeeping measures, if you'll permit, Your Honor.

THE COURT: Yes.

MR. LOWTHER: Number one, Judge Goodwin in the MDL, he wanted us to submit full transcripts. I think the judge got simply tired of seeing full transcripts. I was just wondering what is Your Honor's preference or chamber's preference when we're relying on a transcript. Do you want us to submit the full transcript or do you prefer pages? Just asking the preference, deposition testimony.

THE COURT: So you want to designate a piece of deposition testimony, and you're asking whether I want the designated pieces or the entire transcript for the entire deposition?

MR. LOWTHER: You said that better than I.

THE COURT: That sounds like a real easy question to me. I don't want the entire transcript.

MR. LOWTHER: Okay.

Second housekeeping measure -- and I haven't spoken with this on defendants. The next motion that is pending is our motion to amend on punitive damages. And I'm wondering, having seen the defendants' opposition -- and we're going to file our reply in a week -- I'm wondering if Your Honor wouldn't accept a request from us at this time to have a hearing, to have oral argument on that motion. I didn't think it was going to be necessary. Now I do, and would be willing to do whatever schedule the defense deems necessary. We can do it video, telephone, in person, whatever you prefer. But I think it would help the Court if we could have a hearing on that motion.

THE COURT: Thank you. I don't know the answer yet. Your request for oral argument is noted. I haven't dived into it enough to know whether I want oral argument or not. If I view it as helpful, I will.

MR. LOWTHER: Thank you.

THE COURT: Anything further from the defense?

MR. CONOUR: A question regarding the scope of your rulings, Your Honor.

THE COURT: Could you move that microphone a little.

MR. CONOUR: I'm sorry again.

Your Honor, a question regarding the scope of your ruling. Does it apply to the argument regarding the TVT-O claims? We have been around and around for several years now

on whether or not there's going to be a claim regarding TVT-O, and at this point I think we need to get a decision before trial.

THE COURT: I'm glad you raised that, because I guess I finished the briefing not sure whether that was something coming up at trial through this witness. You sort of referenced that it's -- that this sort of background information he offers might be useful, but it's not an opinion I assumed you were going to be relying on at trial through Dr. Elliott on this.

Where are you on this?

MR. LOWTHER: The answer is at this time and I don't think in the future we're going to be seeking a cause of action and damages on the TVT-O, but yeah, he could have some helpful opinions that touch upon the TVT-O, including where he rules out the TVT-O. And we think this is simply best left for trial. If Your Honor thinks we're going beyond where we should be, that could be dealt with very easily with some sort of sidebar, a limiting instruction.

THE COURT: The second piece is, like almost every lawyer I've ever known, you've been somewhat qualified in your statements, so I don't know whether this is a claim at trial or not. Do you know? And if you don't, when will you know?

MR. LOWTHER: There is no claim for damages pursuant to the TVT-O. I don't believe there is going to be. When are

we going to know?

THE COURT: Well, if you say today there is no claim for damages related to TVT-O, then I'm not going to allow you to change your mind later. We're too close to trial to have you flip-flop on that. So if there's no claim today, there's no claim at trial.

Do you know if there's no claim today?

MR. LOWTHER: You've asked me a direct question, I'm going to give you a direct answer, which is no, there is no TVT-O injury today that we can claim.

The one proviso, if you'll permit me, Your Honor, is just what if her medical condition happens to change between now and trial. And, again, I don't think so. It hasn't happened in the number of years. I would only ask for that -- the smallest of windows, just in case that were to happen, just to protect Mrs. Smith in that eventuality. But no, we have no claim on the TVT-O.

THE COURT: All right. So no claim on TVT-O. If something happens, we'll deal with it. The better course is probably a separate complaint, but we'll see where we are on that.

MR. LOWTHER: Okay.

THE COURT: So then you have an avenue in which you think you might nevertheless want Dr. Elliott to testify about TVT-O, and so I guess where are you on that? You don't have a

claim -- it sort of seems to me like maybe this is something where you'd say, well, I challenge this piece of his testimony not under *Daubert* but under 403 even or 401, for that matter.

MR. CONOUR: It could be 403, could be 401, it could be any of that. But here's the problem. We're operating under an amended complaint, Docket No. 13, that includes a claim against TVT. That claim has not been dismissed. Nonetheless, when we took depositions of the treaters here, plaintiffs represented that they were not pursuing a claim regarding the TVT product, and we said fine, we will not go into that product in detail with these doctors.

THE COURT: Well, let's first of all clear up that problem. You've said there's no claim for TVT-O, and to make it clear for our trial purposes, I'm going to dismiss that claim. You can reraise it if the small window you've asked for comes up, and we'll deal with it then. So it's not with prejudice.

That still leaves us with -- I guess the main thing that has to happen next is some way of identifying, since there's no claim in the case, what piece of what has been said about this you still consider relevant for trial purposes. It's probably too much on the fly right now to ask you to do that today. So what's the best mechanism to have you commit to what pieces of his testimony which is in a claim that's gone but may have relevance to claims that are in, what piece of his

testimony you're actually proposing he speak at trial?

MR. LOWTHER: I can say today, Your Honor, I think what he would speak about, number one, perhaps that the TVT-O did not --

THE COURT: Well, actually, I'd prefer that you not say today. I'd prefer that you submit something that says here are the pieces of the TVT-O testimony by Dr. Elliott that we still intend to use at trial in support of, you know, existing claims.

MR. LOWTHER: Yes, we could do that. We could do that designation. I understand the import of your question. Yes, it is quite a bit to do on the fly. To the extent we're going to have TVT-O testimony, we will let the defense and Your Honor know in advance.

THE COURT: How soon could you do that, to just give an outline of the pieces of TVT-O testimony you intend to introduce at trial such that we could pretrial litigate its admissibility as opposed to on the fly at trial? I'm not opposed to -- there's a lot of things that happen on the fly at trial. I'm fine with that. But if we can litigate that part of trial, it would probably make the trial smoother.

MR. LOWTHER: Would a month before trial be appropriate for your purposes, Your Honor?

THE COURT: Yes. And then you can include that in the round of motions that happen. Actually, it should be a

month before the PTC, not trial. That's coming right up.

MR. CONOUR: Your Honor, I would just suggest in other cases we've encountered this before where there have been multiple products but a claim is only made against one of the products, and we've been able to reach stipulations as to what evidence will come in regarding the other product. And I think that with Mr. Lowther, we should be able to do that today -- not today, but we should be able to do that in the case, if not in the whole, in great part so we can limit what's in dispute.

THE COURT: I encourage you to work on that goal. If you don't, we have a mechanism now for litigating it.

Anything else from the defense?

MR. CONOUR: No, Your Honor.

THE COURT: Thank you all. We'll be in recess.

MR. CONOUR: Thank you.

THE COURTROOM DEPUTY: Court is in recess.

(Proceedings concluded at 11:46 a.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway *April 12, 2022*

BONITA J. SHUMWAY, CSR, RMR, CRR DATE
Official Court Reporter